No. 98-266

(6)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ANNE ARUNDEL COUNTY, MARYLAND,
Petitioner,
v.
JOHN D. WEST, *et al.*,
Respondents,
UNITED STATES OF AMERICA,
Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND NATIONAL GOVERNORS' ASSOCIATION, JOINED BY THE GOVERNMENT FINANCE OFFICERS ASSOCIATION, NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, AND INTERNATIONAL PERSONNEL MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amicus curiae* in support of petitioner. Petitioner and the United States have consented to the filing of this brief. This motion is made necessary by the refusal of respondents to give unconditional consent to the filing.

Amici are organizations whose members include state, county, and municipal governments and officials

throughout the United States. This case presents a question of extraordinary importance to state and local governments throughout the United States—whether the Fair Labor Standards Act mandates that local governments pay overtime on the basis of a forty hour workweek to fire department employees who engage in fire protection activities but who are also called upon to provide emergency medical services.

The court of appeals held that the FLSA's partial overtime exemption for employees engaged in fire protection activities, *see* 29 U.S.C. § 207(k), does not apply to respondents. The court so held notwithstanding the district court's finding that respondents are "employed by an organized fire department," have met the training requirements for firefighters under state law, have "legal authority and responsibility to engage in the prevention, control or extinguishment of a fire," and "perform[] activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires." 29 C.F.R. § 553.210(a); *see* Pet. App. 13a-15a. Instead, the court of appeals, relying on the Department of Labor's 80/20 rule, reasoned that respondents' activities as EMTs are not "integrally relate[d] to the Fire Department's fire protection activities" because "EMTs perform mostly medical services and work related to medical services." Pet. App. 89a-90a.

In furtherance of the fundamental purpose of protecting public safety, most local governments throughout the United States have established emergency medical services teams, assigning them to their fire departments. Like Anne Arundel County, *see* Pet. 3, most local governments cross-train their fire department personnel to respond to both firefighting and

medical emergencies. Indeed, in Anne Arundel County, as in most jurisdictions, medical emergencies predominate among the calls to which fire department personnel respond. *Id.* at 3, 11-12.

The holding below subjects local governments within the Fourth Circuit to crippling overtime liability and could force local governments to substantially curtail the range of emergency medical services they provide. It also creates a conflict with the holdings of the Fifth and Eighth Circuits, creating uncertainty for the numerous local governments in the circuits which have yet to address the issue. Because of the importance of this issue to *amici* and their members, *amici* respectfully move for leave to file the attached brief to assist the Court in its determination whether to grant further review.

Respectfully submitted,

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November 3, 1998

QUESTIONS PRESENTED

1. Whether the Fair Labor Standards Act's § 7(k) overtime exemption for public safety employees covers local government firefighters who perform emergency medical services.

2. Whether the Fair Labor Standards Amendments of 1974 violate the Tenth Amendment and the Constitution's structural framework of dual sovereignty by (a) directing the functioning of state and local government public safety operations and (b) interfering with the provision of essential local emergency services.

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INTEREST OF THE *AMICI CURIAE*

The interest of the *amici* is set forth in the motion accompanying this brief.[1]

STATEMENT

Amici adopt petitioner's statement.

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for three reasons. First, the Fourth Circuit's holding is in direct conflict with the holding of the Fifth and Eighth Circuits on an issue of utmost importance to local governments throughout the nation. *See Christian v. City of Gladstone*, 108 F.3d 929 (8th Cir.), *cert. denied*, 118 S.Ct. 557 (1997); *Bond v. City of Jackson*, 939 F.2d 285 (5th Cir. 1991). Public employers and their employees are thus in urgent need of this Court's guidance.

Second, the Fourth Circuit's interpretation of the Department of Labor's regulations renders a nullity the Section 207(k) exemption for the majority of local governments which provide EMS services. The consequence of the Fourth Circuit's mandate that local governments pay overtime on the basis of a forty hour workweek will lead to substantial monetary liability and could force local governments to substantially alter the scope of the emergency medical services they provide. The issue is thus one of exceptional national importance.

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[1] Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and that no person or entity, other than the *amici* and their members, made a monetary contribution to the preparation and submission of the brief.

Third, the evolution of Tenth Amendment jurisprudence since *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528 (1985), establishes that the commerce clause does not provide Congress with unlimited power vis-a-vis the States. This case presents an appropriate opportunity to resolve a question of fundamental importance to the federal system which was not at issue in *Garcia*—whether the States surrendered to the Federal Government power under the Commerce Clause to regulate them in the performance of their public safety functions.

I. THE COURTS OF APPEALS ARE IN CONFLICT ON THE ISSUE OF WHETHER EMS PERSONNEL ARE SUBJECT TO THE FLSA'S SECTION 207(k) EXEMPTION

The Fourth Circuit's holding is in direct conflict with the holdings of the Fifth and Eighth Circuits that fire department EMS personnel are subject to the Section 207(k) overtime exemption for employees engaged in fire protection activities. *See Christian v. City of Gladstone*, 108 F.3d 929 (8th Cir.), *cert. denied*, 118 S.Ct. 576 (1997); *Bond v. City of Jackson*, 939 F.2d 285 (5th Cir. 1991).

In *Bond*, the Fifth Circuit held that EMS personnel of a fire department were engaged in fire protection activities under Section 207(k), notwithstanding that they were "not trained firefighters" and that their "primary role" was "to tend to the medical needs of the patient." 939 F.2d at 286. In determining whether the EMS employees were engaged in "fire protection activities," the court did not look to the 80/20 rule. *See id.* at 287-88. Instead, it relied on the language of 29 C.F.R. § 553.210(a) stating that " '[t]he term ['employment of any employee in fire protection activities'] would also include rescue and

ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See [§]553.215.'" *Id.* at 288. The court also relied on a DOL Wage and Hour Division Letter Ruling interpreting § 553.215 as imposing only two requirements for the exemption. *Id.* at 287-88. These are (1) that EMS employees have "received training in the rescue of fire and accident victims" even if they do not routinely perform such rescues and (2) that they be "dispatched regularly to fire and accident scenes." *Id.* at 288.

In *Christian*, paramedics cross-trained as firefighters sued their municipal employer, seeking overtime pay for hours worked in excess of forty per week. 108 F.3d at 930-31. The district court held that the paramedics did not satisfy the four-part test of 29 C.F.R. § 553.210(a). *Id.* at 932. The court further held that the employees did not meet the alternative test for rescue and ambulance personnel, which requires that they "form an integral part of the public agency's fire protection activities," 29 C.F.R. § 553.210(a), because the employees "spent more than 20% of their time on activities unrelated to firecalls." 108 F.3d at 933.

The Eighth Circuit reversed. The court first noted that the employees met the four-part test of 29 C.F.R. § 210(a) because they were "sworn firefighters" and "respond to every fire alarm where a fire has been confirmed." 108 F.3d at 932. As the Eighth Circuit reasoned, "[t]he four-part test has no requirement that firefighting be the employees' only or primary duty, and the fact that the paramedics are also able to provide medical services while at fires and elsewhere does not eliminate their responsibility for firefighting." *Id.*

The Eighth Circuit then turned to the district court's application of the 80/20 rule and its conclusion that more than twenty percent of the paramedics' activities were unrelated to fire protection activities because it was "spent on accident and emergency medical calls other than fires or car accidents." *Id.* at 933. The court rejected the district court's approach, noting that it was inconsistent with the purpose of the exemption and several Department of Labor Letter Rulings. *Id.* at 934. In the view of the Eighth Circuit, "[p]roviding paramedic services on accident and medical emergency calls not stemming from a fire or car accident does not alter the nature of the [paramedics'] duties or cause them to perform tasks unrelated to their job." *Id.* The Eighth Circuit thus held that "Section 553.212 does not apply here to defeat the partial overtime exception for the paramedics." *Id.*

The analysis and holdings of the Fifth and Eighth Circuits thus squarely conflict with the Fourth Circuit's holding "that 29 C.F.R. § 553.212(a) directs the conclusion that EMTs are not employees engaged in 'fire protection activities.'" Pet. App. 89a. The Fourth Circuit reasoned that petitioner's EMTs "do not qualify as fire protection employees because they exceed [the] twenty percent limit." *Id.* at 90a. Under the Fourth Circuit's approach, "[m]edical services which are not rendered at the scene of any fire do not qualify as exempt activities." *Id.* In the Fourth Circuit's view, petitioner's "EMTs perform mostly medical services and work related to medical services. As such, they are medical personnel rather than firefighters." *Id.*

There is thus an intolerable conflict between the courts of appeals on an issue of vital importance to

numerous local governments throughout the country. Allowing additional cases to percolate in the lower federal courts will only further confuse the state of the law. The Court should therefore grant the petition for a writ of certiorari.

II. THE FOURTH CIRCUIT'S HOLDING RENDERS A NULLITY AN FLSA EXEMPTION OF EXCEPTIONAL IMPORTANCE TO LOCAL GOVERNMENTS

In response to the increased expectations of their citizens for emergency medical services, numerous local governments throughout the United States have created EMS units. Most local governments have assigned EMS units to their fire department because it has "a sizable body of reliable, trained, and disciplined personnel, operating within an existing command structure, possessing vehicular and communications resources, operating from structural facilities located throughout the community, and holding the confidence of the public." International City Management Association, *Managing Fire Services* 351 (Ronny J. Coleman & John A. Granito eds., 2d ed. 1988). In addition, local governments recognized "that most firefighting personnel were actually engaged in emergency activity for only a small percentage of their local available on-duty time." *Id.*

Fire departments are thus the principal providers of EMS throughout the United States. *See id.* at 350. Most significantly, EMS calls commonly comprise the majority of emergency calls answered by fire departments. *See id.*; *see also* Kevin Roche & Marisa E. Campbell, *The National Run Survey 1996*, Firehouse 94-98 (June 1997) (breaking down fire department calls for 216 local governments). As a study of Cali-

fornia's fire departments found, "67.5 percent of all emergency calls answered by California fire departments are EMS-related." *Managing Fire Services* at 350.

The court of appeals' holding effectively renders the Section 207(k) exemption a nullity for most local governments. Not only does the court's holding expose local governments to massive liability for overtime and liquidated damages, it also jeopardizes the ability of local governments to provide emergency medical services to their citizens.

In many jurisdictions, firefighters traditionally spent substantial amounts of unproductive time waiting for the next firecall. As "there is little justification for limiting full-time paid firefighters to the single role of firefighting," *Managing Fire Services* at 370, local governments have commonly cross-trained their firefighters to provide EMS services. As in this case, where "at least eighty percent of the Fire Department's calls required only emergency medical services and did not involve fire suppression at all," Pet. App. 90a, EMS calls predominate in most fire departments. *See Managing Fire Services* at 350; *The National Run Survey* at 94-98. The Department of Labor's 80/20 rule thus exposes most fire departments in the country to crippling liability for overtime and liquidated damages. It renders the Section 207(k) overtime exemption a dead letter for these departments.

In enacting the Section 207(k) exemption, Congress recognized that it is inappropriate to apply the FLSA's forty hour workweek overtime standard to uniformed firefighters. *See* House Conf. Rep. No. 953, 93d Cong., 2d Sess. (1974), *reprinted in* 1974

U.S.C.C.A.N. 2862, 2864. As the Conference report explained, "the standard FLSA 'hours of work' concept [is] directed primarily at industrial and agricultural occupations" and does not "reflect[] the uniqueness of the firefighting service" which has customarily used the "tour of duty" concept. *Id.* Whether employees of fire protection agencies are employed solely as firefighters or as cross-trained EMTs, the nature of their work is the same: protecting public safety by preparing for, and waiting to respond to, a call for emergency services.

The court of appeals' construction of the DOL regulations—particularly its reliance on the 80/20 rule to conclude that the activities of Anne Arundel County's EMS personnel are not "integrally relate[d] to the Fire Department's fire protection activities"—is contrary to Congress' purpose of exempting these employees from the forty hour workweek overtime standard. Section 207(k) is clear on its face; if fire department employees engage in fire protection activities, as respondents plainly do, they are subject to the partial overtime exemption. *See* 29 U.S.C. § 207(k).

The court of appeals' holding amounts to no more than a bare bones conclusion. It ignores the numerous facts which demonstrate that respondents' activities "integrally relate to the Fire Department's fire protection activities," *see* Pet. App. 89a, and that respondents "form an integral part of the [county's] fire protection activities." 29 C.F.R. § 553.210(a). These include:

1) that the County's EMS personnel have been trained as firefighters;

2) that they are designated as firefighters;

3) that they are assigned to the County's 30 firestations;

4) that they work the same shifts and are integrated into the same command structure as other firefighters; and

5) that under the County's "first responder" policy, any firefighter may be dispatched to render emergency medical care or to the scene of a fire, accident or other emergency.

See Pet. 3-4.

In short, if Anne Arundel County's EMS personnel do not "form an integral part of the public agency's fire protection activities," 29 C.F.R. § 553.210, then few, if any, of the numerous local governments throughout the country which use cross-trained personnel are entitled to the exemption. The Court should therefore grant the petition to correct the Fourth Circuit's manifestly erroneous interpretation of Section 207(k).

III. THE COURT OF APPEALS' HOLDING UNDULY INTRUDES ON THE STATES' PUBLIC SAFETY FUNCTIONS IN A CONSTITUTIONALLY IMPERMISSIBLE MANNER

The Fourth Circuit's holding has grave consequences which go beyond the considerable monetary judgment it affirmed. The court's holding will cause local governments to alter their existing response procedures to protect against the incurrence of overtime liability, re-organize their departments, and/or reduce the level of EMS they provide. The intrusiveness of the Fourth Circuit's holding, taken together with this Court's recent Tenth Amendment jurisprudence, demonstrate that this is an appropriate case to

clarify the scope of the holding of *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

Amici are mindful of "the central importance of *stare decisis* in this Court's jurisprudence." *Hilton v. S.C. Public Rys. Comm.*, 502 U.S. 197, 201 (1991). The Court's recent Tenth Amendment cases, however, have properly called into question the continuing vitality of *Garcia*'s holding that the States must rely on Congress, and not the Court, for protection from all unduly intrusive exercises of the commerce power. *See, e.g., Printz v. United States*, 117 S.Ct. 2365, 2383 (1997) (questioning validity of "the incidental application to the States of a federal law of general applicability [that] excessively interfered with the functioning of state governments"); *New York v. United States*, 505 U.S. 144 (1992).

Moreover, the Court has recognized that there are indeed judicially enforceable limits to the commerce power. *See United States v. Lopez*, 514 U.S. 549 (1995). As the Court recently observed, "[a]lthough the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'" *Printz*, 117 S.Ct. at 2376 (quoting The Federalist No. 39, at 245 (James Madison)). The Framers envisioned a constitutional structure in which "[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people." The Federalist No. 45, at 296 (J. Madison) (Isaac Kramnick ed., 1987). *See also Lopez*, 514 U.S. at 552. *Amici* therefore respectfully submit that it is appropriate for the Court to revisit *Garcia* to determine whether the commerce power authorizes Congressional regulation of the

States' public safety function or whether this function is part of the residuary and inviolable sovereignty retained by the States in forming the Union.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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